A **SELVA VINAYAGAM SURES v. TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS**

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR CJ (SABAH & SARAWAK)
MOHD ZAWAWI SALLEH FCJ
B VERNON ONG LAM KIAT FCJ
ZALEHA YUSOF FCJ
ZABARIAH MOHD YUSOF FCJ
[CRIMINAL APPEAL NO: 05(HC)-270-11-2019(B)]
11 DECEMBER 2020

C

CRIMINAL PROCEDURE: *Habeas corpus – Application for – Whether detention unlawful – Detention order issued pursuant to s. 6(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316') – Grounds of detention order revealed detenu acting alone without participation from any other person – Whether detenu*
D *acting alone deemed to fall within ambit and scope of scrutiny under Act 316 – Whether scope explicitly confined to substantial body of persons – Whether there was failure to comply with rule of law – Whether detention order ultra vires art. 149 of Federal Constitution and Act 316 – Whether writ of habeas corpus ought to be issued*

E ***PREVENTIVE DETENTION:*** *Habeas corpus – Writ – Application for – Detention under s. 6(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316') – Grounds of detention order revealed detenu acting alone without participation from any other person – Whether detenu acting alone deemed to fall within ambit and scope of scrutiny under Act 316 – Whether scope explicitly*
F *confined to substantial body of persons – Whether there was failure to comply with rule of law – Whether detention order ultra vires art. 149 of Federal Constitution and Act 316 – Whether writ of habeas corpus ought to be issued*

STATUTORY INTERPRETATION: *Interpretation – Preamble to Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316') – Whether Act to stop*
G *action prejudicial to public order taken or threatened by 'a substantial body of persons' – Whether Act 316 consonant with art. 149 of Federal Constitution – Interpretation Acts 1948 and 1967, ss. 15 and 17A – Whether provides that short title, long title and preamble to Act 316 should be construed as part of Act 316 – Whether purpose and object of Act 316 should be read into s. 6(1) to give it meaning*
H *intended by Parliament – Whether interpretation and construction of any written law shall have regard to underlying purpose or object of the Act – Codification of purposive rule of construction – Whether includes purpose or object manifest in long title and preamble of Act*

I A detention order pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316') was issued by the Deputy Minister of Home Affairs directing that the appellant be detained for a period of two years. The appellant filed an application at the High Court for a writ

of *habeas corpus* on the ground that the detention order was unlawful. At the High Court, the appellant's sole ground was that the respondent failed/refused to produce the appellant's statement which was recorded by the investigating police officer ('IPO') pursuant to s. 4 of Act 316. The High Court dismissed the appellant's application on grounds that the IPO had carried out a proper investigation and examination of the appellant under s. 4(1) of Act 316 and that the non-production of the appellant's statement did not breach any procedural requirement under Act 316. Hence, the appellant appealed. This appeal was brought directly to the Federal Court without leave pursuant to s. 374 of the Criminal Procedure Code ('CPC'). Before this court, the appellant raised a new point – that the detention order and the grounds and allegations of fact thereunder were *ultra vires* art.149 of the Federal Constitution ('FC') and the preamble of Act 316. At the heart of the appellant's argument was that the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit revealed that the appellant was acting alone without any participation from any other persons; it did not allege that the appellant's activities were being conducted in association with a substantial body of persons. The preamble to Act 316 states that it is an Act to stop action which is prejudicial to public order which has been taken or threatened by 'a substantial body of persons.' Act 316 is consonant with art. 149 of the FC which provides that an Act of Parliament which recites that 'action has been taken or threatened by any substantial body of persons' is valid. As s. 15 of the Interpretation Acts 1948 and 1967 ('Interpretation Acts') provides that the short title, the long title and the preamble to Act 316 should be construed as part of the Act, the activities of a single person could not be deemed to be within the ambit and scope of scrutiny under the preventive legislations such as Act 316. As such, it was argued that the ambit or scope of the Act is only confined to a substantial body of persons. The respondent, however, argued that (i) the preamble to Act 316 is not relevant to the purposes of construction or considering the scope of the provisions of s. 6(1) as there is no ambiguity whatsoever in the latter; (ii) the appellant's argument was inconsistent with the broad and practical approach that the court had taken to see the scheme of the legislation both under the FC and Act 316 – to stop actions which was prejudicial to public order; and (iii) pursuant to s. 11C of Act 316, the detention order may only be challenged on grounds of non-compliance with any procedural requirement, and nothing else.

Held (setting aside detention order; writ of *habeas corpus* issued)
Per Vernon Ong Lam Kiat FCJ delivering the judgment of the court:

(1) The declared purpose of the Interpretation Acts as manifested in the long title to the Act was for the application, construction, interpretation and operation of written laws. Read in this light, s. 17A of the Interpretation Acts underscores Parliament's intention that the interpretation and construction of any written law shall have regard to the underlying

purpose or object of the Act. And s. 15 as amended further emphasised the point by stating that the long title and preamble and every schedule shall be construed and have effect as part of the Act. That is the codification of purposive rule of construction, which is not merely confined to the provision of a section of the Act, but also includes the purpose or object manifest in the long title and preamble of the Act. (para 40)

(2) The words 'purpose or object underlying the Act' bear particular significance in the interpretation of preventive laws promulgated pursuant to art. 149 of the FC. The purpose of art. 149 of the FC is clear. It affirms the validity of legislation enacted against subversion, action prejudicial to public order *etc* notwithstanding that such legislation may be at variance with the fundamental liberties contained in arts. 5, 9, 10 or 13 of the FC. Act 316 is one such legislation. Act 316's underlying purpose is self evident in its long title and preamble – (i) the preventive detention of persons involved in illicit drug trafficking activities; and (ii) to stop action which has been taken or is being threatened by a substantial body of persons which is prejudicial to public order. (paras 41 & 42)

(3) Notably, sub-s. 6(1) refers to two factors – (i) authorises the Minister to exercise his power to make a detention order if he is satisfied that such person is involved in illicit drug trafficking activities and that (ii) it is necessary in the interest of public order to make the detention order. What was significant was the omission to refer to the involvement of 'a substantial body of persons' in relation to the public order element; which scope is clearly stated in the preamble as 'action which is prejudicial to public order ... has been taken ... by a substantial body of persons.' (para 45)

(4) In light of ss.15 and 17A of the Interpretation Acts, the purpose and object of Act 316 should be read into s. 6(1) in order to give it the meaning intended by Parliament when it enacted Act 316 under the authority of art. 149 of the FC. This was particularly important as art. 149 which provides for special powers against subversion *etc* gives justification for substantial restrictions on fundamental liberties even under normal circumstances. To construe s. 6(1) without reading into it the purpose of the Act would be (i) to render the declared purpose and object which is spelt out in the Long Title and Preamble as mere verbiage; and (ii) to render otiose the provisions of ss. 15 and 17A of the Interpretation Acts. (para 46)

(5) The power under s. 6(1) may only be exercised if the following three key ingredients are set out in the grounds of the detention order and allegations of fact which are (i) that the activity which has been taken or is being threatened by a substantial body of persons relates to or

involves the trafficking in dangerous drugs; (ii) that the detenu is a member of a substantial body of persons; and (iii) that the Minister is satisfied that it is necessary in the interest of public order that the detenu be subject to preventive detention. The only allegation was that the appellant was acting alone. There was no allegation that the appellant's activities were being carried out in association with or involved a substantial body of persons. (paras 47 & 48)

(6) The fact of the appellant acting alone could not be deemed to fall within the ambit and scope of scrutiny under Act 316; which scope is explicitly confined to a substantial body of persons. The omission in setting out all the three vital ingredients indicated that the mind of the Deputy Minister was not applied to the question of the preventive detention of the appellant in this case. There was a failure to comply strictly with the letter of the rule of law. Consequently, the exercise of power by the Deputy Minister in the circumstances of this case was bad in law. Thus, the detention order was *ultra vires* art.149 of the FC and Act 316. (paras 50 & 51)

Bahasa Melayu *Headnotes*

Satu perintah penahanan bawah s. 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta 316') dikeluarkan oleh Timbalan Menteri Hal Ehwal Negeri mengarahkan perayu ditahan untuk tempoh dua tahun. Perayu memfailkan permohonan di Mahkamah Tinggi untuk writ *habeas corpus* atas alasan perintah penahanan menyalahi undang-undang. Di Mahkamah Tinggi, alasan utama perayu adalah bahawa responden gagal/menolak untuk mengemukakan pernyataan perayu yang direkodkan oleh pegawai polis penyiasat ('IPO') menurut s. 4 Akta 316. Mahkamah Tinggi menolak permohonan perayu atas alasan IPO telah menjalankan penyiasatan dan pemeriksaan perayu dengan tepat bawah s. 4(1) Akta 316 dan pernyataan perayu yang tidak dikemukakan tidak melanggar apa-apa keperluan prosedur Akta 316. Oleh itu, perayu merayu. Rayuan ini dibawa terus ke Mahkamah Persekutuan bawah s. 374 Kanun Tatacara Jenayah ('KTJ'). Di hadapan mahkamah ini, perayu membangkitkan satu hujahan baru – bahawa perintah penahanan dan alasan-alasan serta dakwaan-dakwaan fakta adalah *ultra vires* per. 149 Perlembagaan Persekutuan ('PP') dan mukadimah Akta 316. Di tengah-tengah hujahan perayu adalah bahawa alasan-alasan perintah penahanan, dakwaan-dakwaan fakta dan afidavit Timbalan Menteri menunjukkan bahawa perayu bertindak sendiri tanpa penglibatan pihak lain; tiada dakwaan bahawa aktiviti-aktiviti perayu dilakukan bekerjasama dengan mana-mana kumpulan. Mukadimah Akta 316 menyatakannya sebagai satu Akta untuk melarang tindakan yang boleh menjejaskan ketenteraman awam yang telah diambil atau diancam oleh 'sekumpulan orang.' Akta 316 adalah selaras dengan per. 149 PP, yang memperuntukkan bahawa Akta Parlimen

yang menyatakan 'that action has been taken or threatened by any substantial body of persons' adalah sah. Seksyen 15 Akta Tafsiran 1948 dan 1967 ('Akta Tafsiran') memperuntukkan bahawa tajuk ringkas, tajuk panjang dan mukadimah Akta 316 harus ditafsirkan sebagai sebahagian Akta, aktiviti-aktiviti seorang diri tidak boleh dianggap berada dalam skop pemeriksaan bawah undang-undang pencegahan seperti Akta 316. Oleh itu, dihujahkan bahawa skop Akta hanya terbatas pada sekumpulan orang. Responden, walau bagaimanapun, berhujah (i) mukadimah Akta 316 tidak relevan dengan tujuan konstruksi atau pertimbangan skop peruntukan s. 6(1) kerana tiada kekaburan dalamnya; (ii) hujahan perayu tidak konsisten dengan pendekatan luas dan praktikal yang diambil mahkamah berkenaan skim perundangan bawah PP dan Akta 316 – untuk menghentikan tindakan yang menjejaskan ketenteraman awam; dan (iii) bawah s. 11C Akta 316, perintah penahanan hanya boleh dibantah atas alasan ketidakpatuhan apa-apa keperluan prosedur, dan bukan yang lain.

Diputuskan (mengetepikan perintah penahanan; writ *habeas corpus* dibenarkan)

Oleh Vernon Ong Lam Kiat HMP menyampaikan penghakiman mahkamah:

(1) Tujuan yang dinyatakan Akta Tafsiran seperti yang ditunjukkan dalam tajuk panjang Akta adalah untuk pemakaian, konstruksi, tafsiran dan operasi undang-undang bertulis. Dibaca dari segi ini, s. 17A Akta Tafsiran menekankan niat Parlimen bahawa tafsiran dan konstruksi apa-apa undang-undang bertulis harus memerhatikan dasar tujuan atau objek Akta. Dan s. 15 seperti yang dipinda mempertekankan selanjutnya perkara dengan menyatakan tajuk panjang dan mukadimah dan setiap jadual harus ditafsirkan dan membawa kesan sebagai sebahagian Akta. Itu adalah pengekodan peraturan bertujuan konstruksi, yang bukan hanya terhad kepada peruntukan seksyen Akta, tetapi juga termasuk tujuan dan objek yang terserlah dalam tajuk panjang dan mukadimah Akta.

(2) Perkataan-perkataan 'purpose or object underlying the Act' mempunyai kepentingan tertentu dalam tafsiran undang-undang pencegahan yang diundangkan bawah per. 149 PP. Tujuan per. 149 PP adalah jelas. Tujuannya menegaskan kesahan perundangan yang digubal terhadap penukaran, tindakan yang menjejaskan ketenteraman awam dan sebagainya walaupun perundangan itu mungkin berbeza dengan kebebasan asasi yang terkandung dalam per. 5, 9, 10 atau 13 PP. Akta 316 adalah salah satu perundangan tersebut. Tujuan yang dipertekankan Akta 316 adalah terbukti secara tersendiri dalam tajuk panjang dan mukadimah – (i) penahanan pencegahan seseorang yang terlibat dalam aktiviti pengedaran dadah terlarang; dan (ii) untuk menghentikan tindakan yang telah diambil atau mengancam oleh sekumpulan orang yang menjejaskan ketenteraman awam.

(3) Terutamanya, sub-s. 6(1) merujuk pada dua faktor – (i) membenarkan Menteri melaksanakan kuasanya untuk membuat perintah penahanan jika beliau berpuas hati bahawa orang itu terlibat dalam aktiviti pengedaran dadah terlarang dan (ii) adalah diperlukan untuk kepentingan ketenteraman awam untuk membuat perintah penahanan. Apa yang penting adalah peninggalan untuk merujuk pada penglibatan 'a substantial body of persons' berhubungan dengan elemen ketenteraman awam; yang skopnya dengan jelas menyatakan dalam mukadimah sebagai 'action which is prejudicial to public order ... has been taken ... by a substantial body of persons.'

(4) Berdasarkan ss. 15 dan 17A Akta Tafsiran, tujuan dan objek Akta 316 harus dibaca pada s. 6(1) untuk memberikannya maksud yang diniatkan oleh Parlimen apabila ia menggubal Akta 316 bawah kuasa per. 149 PP. Ini adalah penting kerana per. 149 yang memperuntukkan kuasa-kuasa khas terhadap penukaran dan sebagainya memberikan justifikasi untuk sekatan besar atas kebebasan asasi walaupun dalam keadaan biasa. Untuk mentafsirkan s. 6(1) tanpa membaca tujuan Akta akan (i) menjadikan tujuan dan objek yang dinyatakan dalam tajuk panjang dan mukadimah sebagai hanya kata-kata berlebihan; dan (ii) menjadikan peruntukan-peruntukan ss. 15 dan 17 Akta Tafsiran lewah.

(5) Kuasa bawah s. 6(1) hanya boleh dilaksanakan jika tiga bahan utama dibentangkan dalam alasan-alasan perintah penahanan dan dakwaan-dakwaan fakta iaitu (i) bahawa aktiviti yang telah diambil atau diancam oleh sekumpulan orang berhubungan atau melibatkan pengedaran dadah berbahaya; (ii) bahawa detenu adalah ahli kumpulan; dan (iii) bahawa Menteri berpuas hati terdapat keperluan dalam kepentingan ketenteraman awam bahawa detenu tertakluk pada penahanan pencegahan. Dakwaan yang terdapat di sini hanya bahawa perayu bertindak sendiri. Tiada dakwaan bahawa aktiviti-aktiviti perayu telah dijalankan bekerjasama dengan atau melibatkan sekumpulan orang.

(6) Fakta perayu bertindak sendiri tidak boleh dianggap terangkum dalam skop pemeriksaan bawah Akta 316; yang skopnya secara eksplisit terkurung kepada sekumpulan orang. Peninggalan untuk menetapkan tiga bahan utama menunjukkan minda Timbalan Menteri tidak terpakai pada soalan penahanan pencegahan perayu dalam kes ini. Terdapat kegagalan untuk mematuhi peraturan undang-undang. Akibatnya, pelaksanaan kuasa Timbalan Menteri dalam keadaan kes ini adalah salah dari segi undang-undang. Oleh itu, perintah penahanan adalah *ultra vires* per. 149 PP dan Akta 316.

Case(s) referred to:

Ahmad Yani Ismail & Anor v. Ketua Polis Negara & Ors [2004] 1 LNS 224 HC ***(dist)***

Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [2016] 1 LNS 374 HC ***(refd)***
Nik Nazmi Nik Ahmad v. PP [2014] 4 CLJ 944 CA ***(refd)***
PP v. Yuneswaran Ramaraj [2015] 9 CLJ 873 CA ***(dist)***
Raja Petra Raja Kamarudin v. Menteri Hal Ehwal Dalam Negeri, Malaysia [2008] 1 LNS 920 HC ***(refd)***
Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126 HC ***(refd)***
Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] 1 LNS 129 FC ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***
Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 LNS 132 SC ***(refd)***

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 4(1), 6(1), 9(1), (2)(a), 10, 11C
Federal Constitution, arts. 5(1), 6, 7, 8, 9(3), 10(2)(a), (b), (c), 11, 12, 13(1), 149(1)(a), (b), (c), (d), (e), (f), 151(1)
Interpretation Acts 1948 and 1967, ss. 15, 17A
Peaceful Assembly Act 2012, s. 9(1), (5)

Other source(s) referred to:
A J Harding, *Law, Government and the Constitution in Malaysia*, (1996) p 209
Abdul Aziz Bari, *Malaysian Constitution, A Critical Introduction*, The Other Press, 203, pp 192-197
Andrew Harding, *The Constitution of Malaysia, A Contextual Analysis, Hart Publishing*, 2012, pp 172, 176
Francis Bennion on Statutory Interpretation, 2nd edn, 1992, p 499
Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia, Star Publications*, 2008, pp 661-2
Sheridan & Groves, *The Constitution of Malaysia, Malayan Law Journal*, 5th edn, 2004

For the appellant - Najib Zakaria; M/s Najib Zakaria, Hisham & Co
For the respondent - Muhammad Sinti; SFC

[Editor's note: For the High Court judgment, please see Selva Vinayagam Sures lwn. Timbalan Menteri Dalam Negeri, Malaysia & Yang Lain [2019] 1 LNS 2121 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat FCJ:

Introduction

[1] On 22 November 2018, a detention order pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316) was issued by the Deputy Minister of Home Affairs directing that the appellant be detained for a period of two years with effect from 22 November 2018

at the Pusat Pemulihan Akhlak, Simpang Renggam, Johor. Section 6(1) authorises the Minister to make such order if he is satisfied that such person has been or is associated with any activity relating to the trafficking in dangerous drugs and that it is necessary in the interest of public order that such person be detained.

[2] The appellant filed an application at the High Court on 27 May 2019 for a writ of *habeas corpus* on the ground that the detention order was unlawful.

[3] At the High Court, the appellant's sole ground was that the respondent failed and/or refused to produce the appellant's statement which was recorded by the investigating police officer ("IPO") pursuant to s. 4 of Act 316. This failure and or refusal to produce the appellant's statement, submitted learned counsel for the appellant, amounted to a substantive procedural non-compliance which justified the writ of *habeas corpus* to be issued.

[4] Suffice it to state that the learned judge dismissed the appellant's application on the grounds that (i) the IPO had carried a proper investigation and examination of the appellant under s. 4(1) of Act 316; and (ii) the non-production of the appellant's statement did not breach any procedural requirement under Act 316. As the High Court's decision is in respect of a *habeas corpus* application, this appeal was brought directly to the Federal Court without leave pursuant to s. 374 of the Criminal Procedure Code.

Appellant's Submission

[5] Before us, learned counsel for the appellant raised a new point – that the detention order and the grounds and allegations of fact thereunder are *ultra vires* art. 149 of the Federal Constitution ("FC") and the preamble of Act 316.

[6] At the heart of the appellant's argument is that the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit revealed that the appellant is acting alone without any participation from any other persons; it did not allege that the appellant's activities were being conducted in association with a substantial body of persons.

[7] The preamble to Act 316 states that it is an Act to stop action which is prejudicial to public order which has been taken or threatened by "a substantial body of persons". Act 316 is consonant with art. 149 of the FC which provides that an Act of Parliament which recites that "action has been taken or threatened by any substantial body of persons" is valid even though it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13 of the FC. As s. 15 of the Interpretation Acts 1948 and 1967 ("Interpretation Acts") provides that the short title, the long title and the preamble to Act 316 should be construed as part of Act 316, the activities of a single person cannot be deemed to be within the ambit and scope of scrutiny under the preventive

legislations such as Act 316. As such, it was argued that the ambit or scope of Act 316 is only confined to a substantial body of persons (*Raja Petra Raja Kamarudin v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [2008] 1 LNS 920; [2008] 8 MLRH 666).

[8] It is therefore necessary to scrutinise the grounds and allegations of fact to ascertain whether the Deputy Minister had taken into account the factor that the appellant has been carrying out the impugned acts in association with a substantial group of persons (*Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2016] 1 LNS 374; [2016] 1 MLRHU 1). A scrutiny will show that it is not the respondent's case that the appellant was a member of a substantial body of persons involved in trafficking in dangerous drugs.

Respondent's Submission In Reply

[9] Learned Senior Federal Counsel (SFC) appearing for the respondent argued that the preamble to Act 316 is not an operating part of the statute. The aid of the preamble is only to be taken when there is some doubt about the meaning of the operative part of the statute. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and when they do so, they cannot be cut down by reference to it. Therefore, the preamble to Act 316 is not relevant for the purposes of construction or considering the scope of the provisions of s. 6(1) as there is no ambiguity whatsoever in the latter (*Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 1 LNS 126; [1976] 2 MLJ 83 (HC); [1977] 2 MLH 18 (FC); *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66 (FC); *Ahmad Yani Ismail & Anor v. Ketua Polis Negara & Ors* [2004] 1 LNS 224; [2005] 4 MLJ 636 (HC)). Section 17A of the Interpretation Acts only enjoins a court to interpret a provision of an Act that would promote the purpose or object underlying the Act (*PP v. Yuneswaran Ramaraj* [2015] 9 CLJ 873 (CA)).

[10] It was also submitted that the appellant's argument is inconsistent with the broad and practical approach that the court has taken to see the scheme of the legislation both under the FC and Act 316 – to stop actions which is prejudicial to public order (*Theresa Lim Chin Chin & Ors v. Inspector General of Police* [1988] 1 LNS 132; [1988] 1 MLJ 293). Pursuant to art. 149 of the FC, Act 316 confers powers on the executive to act in a manner inconsistent with arts. 5, 9, 10 and 13 of the FC (*Teh Cheng Poh v. PP* [1978] 1 LNS 202). Whilst conceding that there is nothing in the grounds or allegations of fact to say that a substantial body or persons is involved, SFC argued that the court should take judicial notice that trafficking in dangerous drugs invariably involves other persons.

[11] At any rate, the preamble is merely a guide as to the object of Act 316. Section 6(1) can be invoked once the Minister is satisfied that (i) the appellant has been or is associated with any activity involving the trafficking in dangerous drugs and (ii) that it is necessary in the interest of public order that the appellant be detained. There is no requirement to show that there is a threat from a substantial body of persons involved in the activity (*Ahmad Yani Ismail v. Inspector General of Police & Ors* [2004] 1 LNS 224; [2005] 4 MLJ 636).

[12] Lastly, SFC argued that pursuant to s. 11C of Act 316 the detention order may only be challenged on ground of non-compliance with any procedural requirement, and nothing else (*Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914).

Decision

[13] In essence, the appellant's argument is that the Deputy Minister failed to consider whether the appellant was carrying out the activities alone or in association with 'a substantial body of persons'. That the detention is only justified and lawful on the basis that the appellant was alleged to have been acting in concert or in association with a substantial body of persons – which allegation was absent on the record.

[14] This argument relates to the question of whether the long title and preamble to Act 316 should be construed and have effect in the interpretation of sub-s. 6(1).

Short Title, Long Title And Preamble To An Act

[15] As a general rule, every Act has a short title, a long title and preamble. The short title is specified in the Act and is used for convenience. This is the name by which the Act is known (and includes the year in which it was passed). The short title appears on the front page, but there is also a section within the Act (usually either the first or the last section) which specifies what the short title is. The long title sets out the subject, scope and purpose of the Act. This appears on the first page after the contents page, immediately before s. 1 of the Act. The long title begins 'An Act ...' and explains briefly the Act's content. Some long titles are quite detailed and informative but others are brief and convey little. It is important because it can be used in court to interpret the Act. The preamble appears immediately after the long title, and states the reason for passing the Act. It may include a recital of the mischief to which the Act is directed and tends to be more comprehensive than a long title (*Francis Bennion on Statutory Interpretation* (2nd edn, 1992) p. 499).

[16] The long title and preamble to Act 316 reads:

> An Act to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs.
>
> [15 June 1985, P.U. (B) 305/1985]
>
> Whereas action which is prejudicial to public order in Malaysia has been taken and further similar action is being threatened **by a substantial body of persons** both inside and outside Malaysia; (emphasis added)
>
> And Whereas Parliament considers it necessary to stop such action;
>
> Now, Therefore, Pursuant to **Article 149** of the Constitution **BE IT ENACTED** by the Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows.

[17] It is clear from the long title and preamble that Act 316 was enacted pursuant to cl. 1 of art. 149 of the FC which is as follows:

> Legislation against subversion, action prejudicial to public order, etc.
>
> 149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> (a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the maintenance of the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof: or
>
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,
>
> any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

[18] Paragraphs (e) and (f) were added into cl. 1 pursuant to the Constitutional Amendment Act 1978 (Act 442); the effect of which was to introduce a totally different aspect and even purposes from the original provision (see *A J Harding, Law, Government and the Constitution in Malaysia* (1996) 209). Therefore, the ambit of art. 149 has been enlarged to deal with,

not just with subversion, but with any social problem, notably drug-trafficking, by use of special powers transgressing the fundamental-rights provisions of the FC.

[19] Accordingly, Act 316 is a special specie of enactment on preventive detention under which the fundamental liberties prescribed under arts. 5 (liberty of the person), 9 (prohibition of banishment and freedom of movement), 10 (freedom of speech, assembly and associations) and 13 (right to property) may be circumscribed.

[20] In this context, one can appreciate the scheme of Act 316 in general, and of the power of preventive detention under sub-s. 6(1) in particular. Sub-section 6(1) is as follows:

> Power to order detention and restriction of persons
>
> 6. (1) Whenever the Minister, after considering:
>
> (a) the complete report of investigation submitted under subsection 3(3); and
>
> (b) the report of the Inquiry Officer submitted under subsection 5(4),
>
> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years.

Preventive Detention Laws

[21] What is preventive detention? Preventive detention has been variously described as (i) an imprisonment that is putatively justified for non-punitive purposes, most often to prevent criminal acts, (ii) the imprisonment of a person with the aim of preventing him from committing further offences or of maintaining public order, and (iii) the holding of someone in jail or in an institution because he or she is regarded as a danger to the community. The singular feature of preventive detention is that the detenu is subject to detention without trial on the assumption that his release would not be in the best interest of society-specifically, that he would be likely to commit additional crimes if he was released.

[22] Preventive detention can also be described as the exercise of the powers of executive detention. Executive detention is detention at the instance of the executive for an indefinite period without charge and without trial. It is typically imposed as a result of an administrative decision, taken in private, by Government officials. Executive detention is designed to be employed in advance – as a preventive measure. Therefore, a detenu is detained not for what he has done, but for what he might do in the future if he remained at liberty.

[23] That the liberty of the person is a fundamental constitutional right cannot be overstated. The same can arguably be said for the fundamental rights provided under arts. 9, 10 and 13 of the FC.

[24] However, the fact that the State can assume exceptional powers to restrict the freedom of its citizens is sanctioned under the FC. A perusal of arts. 5, 9, 10 and 13 of the FC shows that the rights in question are qualified and not absolute. The art. 5 right to life and liberty is qualified in that it may be restricted "in accordance with law" (see cl. (1) of art. 5). The same qualifying words are applied for the restriction on the right to property (see cl. (1) of art. 13). Article 9 on the right to freedom of movement and art. 10 on the right to freedom of speech, assembly and association are also qualified as Parliament may by law impose restrictions on such rights (see cl. (3) of art. 9 and cl. (2)(a)-(c) of art. 10).

[25] In this connection, art. 149 of the FC permits derogation from arts. 5, 9, 10 and 13 of the FC in respect of legislation 'against subversion, action prejudicial to public order, etc'. Therefore, art. 149 is a special provision under the FC as it authorises Parliament to enact laws which circumscribe the fundamental rights under arts. 5, 9, 10 and 13.

[26] Given that the arts. 5, 9, 10 and 13 rights are fundamental, it is not unexpected for art. 149 and enactments restricting these fundamental rights to come under critical scrutiny. Article 149 has been described as a provision which "... gives great powers of Government to Parliament when Parliament chooses to exercise those powers. Parliament's Act must 'recite' that action has been taken or threatened. The actions or threats which could give rise to such appears as broad as language could provide for." (see *Sheridan & Groves, The Constitution of Malaysia (Malayan Law Journal*, 5th edn, 2004) at p. 594). Learned author Andrew Harding noted that whilst art. 149 of the FC allows art. 5, as well as other fundamental rights provisions, to be overridden, "[o]ne of the difficulties with legislation as broad in substantive scope as it is narrow in procedural protection is that there is potentially no limit to the types of cases that can be regarded as coming under it." (See *Andrew Harding, The Constitution of Malaysia, A Contextual Analysis* (Hart Publishing, 2012) at pp. 172, 176); see also Abdul Aziz Bari, *Malaysian Constitution, A Critical Introduction* (The Other Press, 203) at pp. 192-197). According to another learned author Professor Shad Saleem Faruqi, a parliamentary law under art. 149 is permitted to violate only four fundamental rights – arts. 5, 9, 10 and 13. The clear intention of the FC is that art. 149 can prevail over arts. 5, 9, 10 and 13 only; that art. 149 cannot override fundamental liberties on arts. 6, 7, 8, 11 and 12 (see Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia*, (Star Publications, 2008) at pp. 661-2).

[27] It must, however, be appreciated that the guaranteed right to personal liberty is not freedom from executive detention as described in para. [22] above, but to freedom from executive detention not authorised by law. It is the lack of legal authorisation which is the subject of prohibition. What is important is that the existence of such powers and its exercise must be clearly prescribed under the law.

[28] Therefore, whilst art. 149 authorises the abridgement of fundamental rights, there are two built-in constitutional safeguards provided by cl. (1) of art. 151.

> Restrictions on preventive detention
>
> 151. (1) Where any law or ordinance made or promulgated in pursuance of this part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di- Pertuan Agong may allow.
>
> (2) ...
>
> (3) ...

[29] The first safeguard confers on the detenu the right (i) to be informed of the grounds for his detention and the allegations of fact, on which the detention order is based, and (ii) to be given an opportunity of making representations against the detention order to an advisory board. The second safeguard relates to a detenu's rights against continued detention without an advisory board having considered his representations and made recommendations on them to the Yang di-Pertuan Agong.

[30] Insofar the first constitutional safeguard is concerned, the right of the detenu to be informed of the grounds for his detention and the allegations of fact on which the detention order is made is provided under sub-s. 9(2) of Act 316; the detenu's entitlement to make representations against the detention order to an advisory board is provided under sub-s. 9(1) and sub-s. 9(2)(a) of Act 316. The second constitutional safeguard is spelt out in s. 10 of Act 316 which provides that after considering the representations, the advisory board shall make recommendations to the Yang di-Pertuan Agong as to whether to continue or lift the detention order.

A **Interpretation Of Preventive Detention Laws**

[31] Preventive detention is, therefore, the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a court of law in which he is proved to have committed an offence punishable under penal law. It is a serious invasion of personal liberty.

B

[32] One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject (see *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors* [1976] 1 LNS 129; [1976] MLRA 132, 145, 146 (FC)). Whatever safeguards
C that are provided by law against the improper exercise of such power must be vigorously enforced by the courts. As such, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising preventive detention must be strictly construed and safeguards which the law provides for the protection
D of any citizen must be liberally interpreted.

[33] The purpose of art. 149 is to enable Parliament, once any one or more of the six categories of action enumerated under paras. (a) to (f) of cl. (1) has occurred, to make laws providing not only for its suppression but also for
E preventing its recurrence. Where such an Act of Parliament confers on the executive to act in a manner inconsistent with arts. 5, 9, 10 or 13, the action must be taken *bona fide* for the purpose of stopping or preventing action of the kind envisaged under the Act (see *Teh Cheng Poh v. PP* [1978] 1 LNS 202; [1979] 1 MLJ 50, 54, (PC)).

F **[34]** Where power is vested in a statutory authority to deprive the liberty of a person on its subjective satisfaction with reference to the specified matters, and if that satisfaction is stated to be based on a number of grounds or for a variety of reasons all taken together, and if some out of them are found to be non-existent or irrelevant, the very exercise of that power is bad.
G Therefore, strict compliance with the letter of the rule of law is the essence of the matter.

[35] In this instance, the long title to Act 316 declares that (i) the object of Act 316 is to provide for the preventive detention of persons involved in illicit drug trafficking activities, and (ii) Parliament considers it necessary to
H stop such activities prejudicial to public order which has been taken or is being threatened by a 'substantial body of persons'.

[36] A careful scrutiny of the long title and preamble to Act 316 will lead to two observations. First, the long title had adopted the wordings of cl. (1) of art. 149 to the effect that "action has been taken .. and is being threatened
I by any substantial body of persons". Second, the long title had also recited the wordings "which is prejudicial to public order" obtained in para. (f) of cl. (1) of Art. 149.

Long Title, Preamble And Schedules

[37] Learned SFC's argument that the long title and preamble is not relevant for the purposes of construing or considering the scope of sub-s. 6(1) must be considered in the light of ss. 15 and 17A of the Interpretation Acts. Section 15 was amended by the Interpretation (Amendment) Act 1997 (Amending Act). Prior to its amendment, s. 15 read as follows:

> Schedules
>
> 15. Every schedule (together with any note or table annexed thereto) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation.

[38] Section 15 was amended to read as follows:

> **Long title, preamble and schedules**
>
> 15. **The long title and preamble and every** schedule (together with any note or table annexed **to the schedules**) to an Act or to any subsidiary legislation shall be construed and have effect as part of the Act or subsidiary legislation. (emphasis added)

The amendments in s. 15 took effect retrospectively on 18 May 1967: see sub-s. 3(2) of the Amending Act. Be that as it may, pre-amendment, s. 15 only requires every Schedule to an Act to be interpreted as part of the Act. The amended s. 15 further requires the long title and preamble to be interpreted and have effect as part of the Act.

[39] It is also important to note that concomitant with the amendments to s. 15, s. 17A was inserted by the Amending Act to emphasise that in construing a provision of an Act, due regard must be had to the purpose or object of the Act. Section 17A which came into force on 25 July 1997 reads as follows:

> Regard to be had to the purpose of Act
>
> 17A. In the interpretation of a provision of an Act, a construction that would promote **the purpose or object underlying the Act** (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. (emphasis added)

[40] The declared purpose of the Interpretation Acts as manifested in the long title to the Act was for the application, construction, interpretation and operation of written laws. Read in this light, s. 17A underscores Parliament's intention that the interpretation and construction of any written law shall have regard to the underlying purpose or object of the Act. And s. 15 as amended further emphasises the point by stating that the long title and preamble and every schedule shall be construed and have effect as part of the

Act. That in our view is the codification of purposive rule of construction, which is not merely confined to the provision of a section of the Act, but also includes the purpose or object manifest in the long title and preamble of the Act.

[41] The words 'purpose or object underlying the Act' bear particular significance in the interpretation of preventive laws promulgated pursuant to art. 149 of the FC. The purpose of art. 149 of the FC is clear. It affirms the validity of legislation enacted against subversion, action prejudicial to public order, etc. notwithstanding that such legislation may be at variance with the fundamental liberties contained in arts. 5, 9, 10 or 13 of the FC.

[42] Act 316 is one such legislation. Act 316's underlying purpose is self-evident in its long title and preamble – (i) the preventive detention of persons involved in illicit drug trafficking activities, and (ii) to stop action which has been taken or is being threatened by a substantial body of persons which is prejudicial to public order.

[43] It is settled law that whilst the material provisions of preventive detention laws must be strictly construed, safeguards which the law provides for the protection of any person must be liberally interpreted. By reason of the foregoing, careful consideration must therefore be given to the scheme of sub-s. 6(1) both under the FC and Act 316.

[44] What is meant by the phrase 'a substantial body of persons'? The word 'substantial' has been defined by the *Oxford Advanced Learner's Dictionary* 5th edn as 'large in amount or value; considerable'; 'considerable' is defined as 'great in number or size'. 'Body' is defined as 'a group of people working or acting as a unit (see *Oxford Advanced Learner's Dictionary* 5th edn) or as '[a] number of individuals spoken of collectively, usually associated for a common purpose, joined in a certain cause or united by some common tie.' (See *Words, Phrases & Maxims – Legally & Judicially Defined* Vol. 2. Anandan Krishnan, LexisNexis 2008). The word 'person' refers to a human being as an individual or a human being, especially not identified (See *Oxford Advanced Learner's Dictionary* 4th edn). In the light of the foregoing, we think that the phrase 'a substantial body of persons' refer to a large number of individuals acting in concert or working together for a common purpose. In the context of Act 316, we think that it refers to action which is prejudicial to public order which has been taken or is being threatened by a large number of individuals acting together in the trafficking in dangerous drugs.

[45] Notably, sub-s. 6(1) refers to two factors – (i) authorises the Minister to exercise his power to make a detention order if he is satisfied that such person is involved in illicit drug trafficking activities and that (ii) it is necessary in the interest of public order to make the detention order. What is significant is the omission to refer to the involvement of 'a substantial body

of persons' in relation to the public order element; which scope is clearly stated in the preamble as 'action which is prejudicial to public order ... has been taken ... by a substantial body of persons…'.

[46] In the light of ss. 15 and 17A of the Interpretation Acts, we are of the view that the purpose and object of Act 316 should be read into sub-s. 6(1) in order to give it the meaning intended by Parliament when it enacted Act 316 under the authority of art. 149 of the FC. This is particularly important as art. 149 which provides for special powers against subversion, etc gave justification for substantial restrictions on fundamental liberties even under normal circumstances (ie, to say, other than during an emergency). We say so for two reasons. To construe sub-s. 6(1) without reading into it the purpose of the Act would be (i) to render the declared purpose and object which is spelt out in the long title and preamble as mere verbiage, and (ii) to render otiose the provisions of ss. 15 and 17A of the Interpretation Acts.

[47] For the foregoing reasons, we think that the respondent's argument that the long title and preamble is not relevant for the purposes of interpreting sub-s. 6(1) is incongruous. It is clear that the power under sub-s. 6(1) may only be exercised if the following three key ingredients are set out in the grounds of the detention order and allegations of fact. One, that the activity which has been taken or is being threatened by a substantial body of persons relates to or involves the trafficking in dangerous drugs. Two, that the detenu is a member of a substantial body of persons. Three, that the Minister is satisfied that it is necessary in the interest of public order that the detenu be subject to preventive detention.

[48] It also goes without saying that the courts must be vigilant in individual cases to ensure that the executive acts within the law and does not encroach unnecessarily into the fundamental liberties of the person. We have scrutinised the grounds of the detention order, the allegations of fact and the Deputy Minister's affidavit. We agree with counsel for the appellant that the only allegation is that the appellant is acting alone. There is no allegation that the appellant's activities were being carried out in association with or involved a substantial body of persons.

[49] The authorities cited by SFC, *Tan Boon Liat* (*supra*) and *Johnson Tan Ham Seng*, (*supra*) were decided before the amendment to s. 15 of the Interpretation Acts. As such, we do not think that they are still applicable insofar as they relate to the construction of the long title and preamble to an Act. In *Ahmad Yani* [2005] (*supra*), Heliliah J (as she then was) held that the recital or preamble to the Internal Security Act 1960 (ISA) provides merely a guide as to the object of the ISA; N S Bindra's, *Interpretation of Statutes* (8th edn, 1997) was cited in support. We have two points to make. One, N B Bindra's book was published before s. 15 of the Interpretation Acts was

amended; as such the opinion of the learned author must be qualified by the amended s. 15. Second, although *Ahmad Yani* was decided after the Amending Act, the amended s. 15 was not considered by the learned judge; had she done so, more probably than not, that she would have decided otherwise. For these reasons, *Ahmad Yani* is distinguishable and overruled. *Yuneswaran* (*supra*) concerns the interpretation of sub-s. 9(1) of the Peaceful Assembly Act 2012 (PAA). In that case, the Court of Appeal adopted the purposive approach pursuant to s. 17A of the Interpretation Acts. It departed from the earlier decision in *Nik Nazmi Nik Ahmad v. PP* [2014] 4 CLJ 944 CA which held that sub-s. 9(5) of the PAA was unconstitutional. As in *Ahmad Yani*, the Court of Appeal in *Yuneswaran* did not apply s. 15 of the Interpretation Acts; neither did the Court of Appeal construe and give effect to the long title and preamble as part of the PAA. In the circumstances, *Yuneswaran* is distinguishable and of no aid to the respondent's argument.

[50] We are, therefore, constrained to hold that the fact of the appellant acting alone cannot be deemed to fall within the ambit and scope of scrutiny under Act 316; which scope is explicitly confined to a substantial body of persons. The omission in setting out all the three vital ingredients indicates that the mind of the Deputy Minister was really not applied to the question of the preventive detention of the appellant in this case. There was a failure to comply strictly with the letter of the rule of law. Consequently, the exercise of power by the Deputy Minister in the circumstances of this case is bad in law.

[51] For the foregoing reasons, we hold that the detention order is *ultra vires* art. 149 of the FC and Act 316. It follows that the detention order is a nullity and is hereby set aside. A writ of *habeas corpus* is hereby issued and the appellant is set at liberty forthwith.